

## Department of Defense

DoDD 4400.1, Defense Production Act Programs.

[64 FR 51075, Sept. 21, 1999]

### **PART 212—ACQUISITION OF COMMERCIAL ITEMS**

#### **Subpart 212.2—Special Requirements for the Acquisition of Commercial Items**

Sec.

212.211 Technical data.

212.212 Computer software.

#### **Subpart 212.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items**

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

212.302 Tailoring of provisions and clauses for the acquisition of commercial items.

#### **Subpart 212.5—Applicability of Certain Laws to the Acquisition of Commercial Items**

212.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.

212.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

#### **Subpart 212.6—Streamlined Procedures for Evaluation and Solicitation for Com- mercial Items**

212.602 Streamlined evaluation of offers.

#### **Subpart 212.70—Pilot Program for Transition to Follow-On Contracting After Use of Other Transaction Authority**

212.7000 Scope.

212.7001 Definitions.

212.7002 Pilot program.

212.7002-1 Contracts under the program.

212.7002-2 Subcontracts under the program.

212.7003 Rights in technical data and computer software.

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212.301

#### **Subpart 212.2—Special Require- ments for the Acquisition of Commercial Items**

##### **212.211 Technical data.**

The DoD policy for acquiring technical data for commercial items is at 227.7102.

##### **212.212 Computer software.**

The DoD policy for acquiring commercial computer software is at 227.7202.

[69 FR 63330, Nov. 1, 2004]

#### **Subpart 212.3—Solicitation Provi- sions and Contract Clauses for the Acquisition of Com- mercial Items**

##### **212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

(f)(i) Use one of the following provisions as prescribed in part 225:

(A) 252.225-7000, Buy American Act—Balance of Payments Program Certificate.

(B) 252.225-7020, Trade Agreements Certificate.

(C) 252.225-7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

(ii) Use the provision at 252.212-7000, Offeror Representations and Certifications—Commercial Items, in all solicitations for commercial items exceeding the simplified acquisition threshold. If an exception to 10 U.S.C. 2410i applies to a solicitation exceeding the simplified acquisition threshold (see 225.770-3), indicate on an addendum that “The certification in paragraph (b) of the provision at 252.212-7000 does not apply to this solicitation.”

(iii) Use the clause at 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items, in all solicitations and contracts for commercial items, completing paragraphs (a) and (b), as appropriate.

(iv) Use the provision at 252.209-7001, Disclosure of Ownership or Control by the Government of a Terrorist Country, as prescribed in 209.104-70(a).

## § 212.301, Nt.

(v) Use the clause at 252.232-7009, Mandatory Payment by Governmentwide Commercial Purchase Card, as prescribed in 232.1110.

(3) A contracting officer supporting a contingency operation as defined in 10 U.S.C. 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. 2302(8) also may use the Governmentwide commercial purchase card to make a purchase that exceeds the micro-purchase threshold but does not exceed the simplified acquisition threshold, if:

(i) The supplies or services being purchased are immediately available;

(ii) One delivery and one payment will be made; and

(iii) The requirements of paragraphs (2)(i) and (ii) of this section are met.

(vi) Use the clause at 252.211-7003, Item Identification, as prescribed at 211.274-4.

(vii) Use the clause at 252.225-7040, Contractor Personnel Supporting a Force Deployed Outside the United States, as prescribed in 225.7402-4.

(viii) Use the clause at 252.225-7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that include the clause at 252.225-7040.

[60 FR 61595, Nov. 30, 1995, as amended at 61 FR 50452, Sept. 26, 1996; 62 FR 34122, June 24, 1997; 63 FR 11528, Mar. 9, 1998; 63 FR 15317, Mar. 31, 1998; 64 FR 8728, Feb. 23, 1999; 64 FR 43101, Aug. 9, 1999; 65 FR 46625, July 31, 2000; 66 FR 49861, Oct. 1, 2001; 66 FR 55122, 55123, Nov. 1, 2001; 68 FR 7439, Feb. 14, 2003; 68 FR 15618, Mar. 31, 2003; 68 FR 58633, Oct. 10, 2003; 68 FR 75200, Dec. 30, 2003; 68 FR 64558, Nov. 14, 2003; 69 FR 1927, Jan. 13, 2004; 70 FR 20836, Apr. 22, 2005; 70 FR 23801, May 5, 2005]

EFFECTIVE DATE NOTE: At 70 FR 53968, Sept. 13, 2005, section 212.301 was amended by removing paragraph (3) introductory text and paragraphs (3)(i) through (iii) and adding paragraph (f)(ix), effective Nov. 14, 2005. For the convenience of the user, the added text is set forth as follows:

### **212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

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(f) \* \* \*

(ix) Use the clause at 252.211-7006, Radio Frequency Identification, as prescribed in 211.275-3.

## 48 CFR Ch. 2 (10-1-05 Edition)

### **212.302 Tailoring of provisions and clauses for the acquisition of commercial items.**

(c) *Tailoring inconsistent with customary commercial practice.*

The head of the contracting activity is the approval authority within the DoD for waivers under FAR 12.302(c).

### **Subpart 212.5—Applicability of Certain Laws to the Acquisition of Commercial Items**

#### **212.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.**

(a) The following laws are not applicable to contracts for the acquisition of commercial items:

(i) Section 806, Public Law 102-190 (10 U.S.C. 2301 (repealed) note), Payment Protections for Subcontractors and Suppliers.

(ii) 10 U.S.C. 2306(b), Prohibition on Contingent Fees.

(iii) 10 U.S.C. 2324, Allowable Costs Under Defense Contracts.

(iv) 10 U.S.C. 2384(b), Requirement to Identify Suppliers.

(v) 10 U.S.C. 2397(a)(1), Reports by Employees or Former Employees of Defense Contractors.

(vi) 10 U.S.C. 2397b(f), Limits on Employment for Former DoD Officials.

(vii) 10 U.S.C. 2397c, Defense Contractor Requirements Concerning Former DoD Officials.

(viii) 10 U.S.C. 2408(a), Prohibition on Persons Convicted of Defense Related Felonies.

(ix) 10 U.S.C. 2410b, Contractor Inventory Accounting System Standards (see 252.242-7004).

(x) 107 Stat 1720 (Section 843(a), Public Law 103-160), Reporting Requirement Regarding Dealings with Terrorist Countries.

(xi) Domestic Content Restrictions in the National Defense Appropriations Acts for Fiscal Years 1996 and Subsequent Years, unless the restriction specifically applies to commercial items. For the restriction that specifically applies to commercial ball or roller bearings as end items, see 225.7019-2(b) (Section 8064 of Public Law 106-259).

(c) The applicability of the following laws has been modified in regard to

## Department of Defense

## 212.602

contracts for the acquisition of commercial items:

(i) 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see FAR 3.503 and 52.203-6).

(ii) 10 U.S.C. 2306a, Truth in Negotiations Act (see FAR 15.403-1(b)(3)).

[60 FR 61595, Nov. 30, 1995, as amended at 63 FR 11851, Mar. 11, 1998; 63 FR 55040, Oct. 14, 1998; 65 FR 77828, Dec. 13, 2000; 67 FR 4208, Jan. 29, 2002; 69 FR 65089, Nov. 10, 2004]

### **212.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.**

(a) The following laws are not applicable to subcontracts at any tier for the acquisition of commercial items or commercial components:

(i) [Reserved]

(ii) Section 806, Public Law 102-190 (10 U.S.C. 2301 (repealed) note), Payment Protections for Subcontractors and Suppliers.

(iii) 10 U.S.C. 2306(b) Prohibition on Contingent Fees.

(iv) 10 U.S.C. 2313(c), Examination of Records of a Contractor.

(v) 10 U.S.C. 2320, Rights in Technical Data.

(vi) 10 U.S.C. 2321, Validation of Proprietary Data Restrictions.

(vii) 10 U.S.C. 2324, Allowable Costs Under Defense Contracts.

(viii) 10 U.S.C. 2327, Reporting Requirement Regarding Dealings with Terrorist Countries.

(ix) 10 U.S.C. 2384(b), Requirement to Identify Suppliers.

(x) 10 U.S.C. 2391 note, Notification of Substantial Impact on Employment.

(xi) 10 U.S.C. 2393, Prohibition Against Doing Business with Certain Offerors or Contractors.

(xii) 10 U.S.C. 2397(a)(1), Reports by Employees or Former Employees of Defense Contractors.

(xiii) 10 U.S.C. 2397b(f), Limits on Employment for Former DoD Officials.

(xiv) 10 U.S.C. 2397c, Defense Contractor Requirements Concerning Former DoD Officials.

(xv) 10 U.S.C. 2408(a) Prohibition on Persons Convicted of Defense Related Felonies.

(xvi) 10 U.S.C. 2410b, Contractor Inventory Accounting System Standards.

(xvii) 10 U.S.C. 2501 note, Notification of Proposed Program Termination.

(xviii) 10 U.S.C. 2534, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods.

(xix)-(xxi) [Reserved]

(xxii) 10 U.S.C. 2631, Transportation of Supplies by Sea (except as provided in the clause at 252.247-7023, Transportation of Supplies by Sea).

(xxiii) Domestic Content Restrictions in the National Defense Appropriations Acts for Fiscal Years 1996 and Subsequent Years, unless the restriction specifically applies to commercial items. For the restriction that specifically applies to commercial ball or roller bearings as end items, see 225.7009-2(b) (Section 8064 of Public Law 106-259).

(b) Certain requirements of the following laws have been eliminated for subcontracts at any tier for the acquisition of commercial items or commercial components:

(i) 10 U.S.C. 2393(d), Subcontractor Reports Under Prohibition Against Doing Business with Certain Offerors (see FAR 52.209-6).

(ii) 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see FAR 3.503 and 52.203-6).

[60 FR 61595, Nov. 30, 1995, as amended at 61 FR 58488, Nov. 15, 1996; 62 FR 5780, Feb. 7, 1997; 65 FR 14401, Mar. 16, 2000; 65 FR 39704, June 27, 2000; 65 FR 77828, Dec. 13, 2000; 69 FR 63331, Nov. 1, 2004]

### **Subpart 212.6—Streamlined Procedures for Evaluation and Solicitation for Commercial Items**

#### **212.602 Streamlined evaluation of offers.**

(b)(i) For the acquisition of transportation and transportation-related services, also consider evaluating offers in accordance with the criteria at 247.206(1).

(ii) For the acquisition of transportation in supply contracts that will include a significant requirement for transportation of items outside the contiguous United States, also evaluate offers in accordance with the criterion at 247.301-71.

## 212.7000

(iii) For the direct purchase of ocean transportation services, also evaluate offers in accordance with the criterion at 247.572-2(c)(2).

[65 FR 50143, Aug. 17, 2000, as amended at 70 FR 35544, June 21, 2005]

### Subpart 212.70—Pilot Program for Transition to Follow-On Contracting After Use of Other Transaction Authority

SOURCE: 69 FR 63330, Nov. 1, 2004, unless otherwise noted.

#### 212.7000 Scope.

This subpart establishes the pilot program authorized by Section 847 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136).

#### 212.7001 Definitions.

As used in this subpart—  
*Nontraditional defense contractor* means a business unit that—

(1) Has entered into an other transaction agreement with DoD; and

(2) Has not, for a period of at least 1 year prior to the date of the other transaction agreement, entered into or performed on—

(i) Any contract that is subject to full coverage under the cost accounting standards described in FAR Part 30; or

(ii) Any other contract exceeding \$500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a Federal agency that is subject to the FAR.

*Other transaction* means a transaction that—

(1) Is other than a contract, grant, or cooperative agreement;

(2) Is not subject to the FAR or its supplements; and

(3) Is entered into in accordance with 32 CFR part 3.

#### 212.7002 Pilot program.

##### 212.7002-1 Contracts under the program.

(a) The contracting officer may use FAR part 12 procedures to award a contract for an item or process that does not meet the definition of “commercial item,” if the contract—

## 48 CFR Ch. 2 (10-1-05 Edition)

(1) Is awarded to a nontraditional defense contractor;

(2) Is a follow-on contract for the production of an item or process begun as a prototype project under an other transaction agreement;

(3) Does not exceed \$50,000,000;

(4) Is awarded on or before September 30, 2008; and

(5) Is either—

(i) A firm-fixed-price contract; or

(ii) A fixed-price contract with economic price adjustment.

(b) See 212.7003 for special procedures pertaining to rights in technical data and computer software.

##### 212.7002-2 Subcontracts under the program.

Except as provided in 212.7003, a subcontract for an item or process that does not meet the definition of “commercial item” may be treated as a subcontract for a commercial item, if the subcontract—

(a) Is under a contract awarded in accordance with 212.7002-1;

(b) Is awarded to a nontraditional defense contractor; and

(c) Is either—

(1) A firm-fixed-price subcontract; or

(2) A fixed-price subcontract with economic price adjustment.

##### 212.7003 Rights in technical data and computer software.

For purposes of determining rights in technical data under 227.7102 and rights in computer software under 227.7202, items or processes acquired under a contract or subcontract awarded in accordance with 212.7002 may be treated as developed in part with Federal funds and in part at private expense (*i.e.*, mixed funding). When this occurs—

(a) For technical data, use the clauses at 252.227-7013, Rights in Technical Data—Noncommercial Items, and 252.227-7037, Validation of Restrictive Markings on Technical Data;

(b) For computer software, use the clauses at 252.227-7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, and 252.227-7019, Validation of Asserted Restrictions—Computer Software;

(c) Require the contractor to include the clauses prescribed by paragraphs

**Department of Defense**

**212.7003**

(a) and (b) of this section in sub-contracts awarded in accordance with 212.7002-2; and

(d) Negotiate for the appropriate technical data and computer software

deliverables and special license rights in those deliverables, in view of the parties' relative contributions to the development of the items or processes.